NO. 3680

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

WONG WONG,
Plaintiff-in-Error,
vs.
HONOLULU SKATING RINK, LTD., MORRIS ROSENBLEDT and FRED HARRISON,
Defendants-in-Error.

No. 3680.
In Error to the Supreme Court of Hawaii.

BRIEF OF THE PLAINTIFF IN ERROR

Upon Writ of Error to the Supreme Court of the Territory of Hawaii.

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By.....Deputy Clerk.

INDEX

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In this action the plaintiff-in-error, Wong Wong, has a personal judgment for $3,998.60 together with interest in the sum of $1,103.72 against the Honolulu Skating Rink, Limited (hereinafter called the Skating Rink), (Vol. 1, Record, p. 57, p. 61) and seeks to enforce a mechanic's lien for that judgment on the lands of Morris Rosenbledt and Fred Harrison (hereinafter called the defendants).

The defendants leased the property sought to be charged to the Skating Rink (Exhibit 10, marked "Plaintiff's Exhibit 'F' ") in which lease it was pro-

vided that the Skating Rink should erect a building thereon at a contract price of not less than $6,000.00, which was to become a part of the fee. The Skating Rink contracted with the plaintiff-in-error for the erection of a building which with extras cost $7,-031.60 (Exhibit 1, marked "Plaintiff's Exhibit 'A'" and Exhibit 18, marked "Defendants' Exhibit '5'," Record, Vol. 1, p. 187). Some payments were made on the contract, which was completed November 2, 1914 (Record, Vol. 1, p. 187; Vol. 1, p. 206; Vol. 1, p. 216; Vol. 1, pp. 259, 260). There was due to the plaintiff-in-error under the terms of the contract $2,000.00 on completion and acceptance November 2, 1914; $2,500.00 on December 2, 1914, and $1,963.60 on December 15, 1914, besides $550.00 for extras due before December 2, 1914. The Skating Rink paid $2,-470.00 before this suit was brought (Record, Vol. 1, p. 137) and there was remittitur of $545.00 paid after suit was brought. (Judgment, Record, Vol. 1, p. 18.) The Skating Rink on December 2, 1914, was in default of payment of $2,580.00. Suit was brought on December 16, 1914, after a filing of the lien and a demand for payment. (Exhibit 11, marked Plaintiff's Exhibit "G".) (Record, Vol. 1, p. 217.)

Lewers & Cooke, Limited, furnished the plaintiff-in-error with material for the construction of the building, advanced money to pay for labor, and to secure themselves had him make an assignment of the payments to them in order to have the payments made through their office. (Record, Vol. 1, p. 170, p.

243, Exhibit 39, marked Defendant's Exhibit 1, Record, Vol. II, p. 387.)

Lewers & Cooke, Limited, and Wong Wong both brought actions to enforce mechanic's liens after the Skating Rink had defaulted in its payment due December 2, 1914, and it was apparent it was bankrupt. The suits were tried together, but in the former the Supreme Court denied the right to enforce the lien as there had been no demand on the owners. *Lewers & Cooke, Limited, v. Wong Wong, Morris Rosenbledt and Fred Harrison,* 24 Haw. 39 and (Vol. II, Record, p. 307).

At the trial in the Circuit Court of the Territory in the present action in February, 1917, the Skating Rink was defaulted, a personal judgment for the amount claimed entered against it, but a motion for non-suit by the defendants was allowed. (Record, Judgment, Vol. 1, p. 51.) In the motion for non-suit one of the grounds alleged was that the building was not completed and accepted on November 2, 1914. (Record, Vol. 1, p. 144.) The certificate for payment by the architect was in evidence (Exhibit 6, marked Order No. 1). (*Wong Wong v. Skating Rink,* 24 Haw. 181-184.) No appeal was taken from this personal judgment either by the Skating Rink or by the defendants as its privies. The plaintiff-in-error sued out a writ of error alleging that so much of the judgment as granted the non-suit was wrong, and the Supreme Court of the Territory of Hawaii in *Wong Wong v. Skating Rink et al.,* 24 Haw. 181, reversed the lower court insofar as the granting of the non-

suit, holding that it would be a travesty on justice for the land to escape, and that the judgment was a lien upon the land.

In further proceedings in the trial court the amount of the judgment of March 1, 1917, to wit: $4,543.60 with interest and costs, less a remittitur of $545.00 which had been paid since suit brought was entered and declared to be a lien upon the land. (Record, Vol. 1, p. 18, p. 51.)

There are two separate forms of procedure in reviewing actions of the trial court by the Supreme Court of the Territory of Hawaii,—writ of error on appeal, which brings up the judgment of decree with the entire record, and the other by exceptions, which does not bring up the entire record, and calls upon the reviewing court merely to pass upon specific questions raised by the bill. Final judgment is not entered on exceptions. *Territory of Hawaii v. Cotton Bros.*, 211 U. S. 162. The defendants sought a review on exceptions and in the hearing before the Supreme Court every material piece of evidence that was before it on the defendants' exceptions was the same as had been before it when the plaintiff-in-error had reviewed the granting of the motion of non-suit in favor of the defendants in February, 1917, and in both appeals the same certificate of the architect (Exhibit 6, marked Order No. 1) was before the court. In both reviews, the question passed upon was: Ought a motion of non-suit be granted the defendants? In both appeals the defendants gave as a reason for the granting of the non-suit

that there was no evidence that the building was completed and accepted on November 2, 1914. The decision against the plaintiff-in-error in 25 Haw. 347 and 413, which was the defendants' review on exceptions, is based on the ground that nothing was due Wong Wong from the Skating Rink at the time suit was brought, although the personal judgment that $3,998.60 was due from the Skating Rink remains in force and in the former appeal the court had decided that sum was due December 16, 1914, the date of the suit.

Further proceedings were again necessary in the lower court after the decision in 25 Haw. 347 and 413. There could be and there was no order for the entry of any judgment. The defendants served Wong Wong on April 10, 1920, with a proposed decision and judgment to be entered by the Circuit Court. (Record, Vol. 1, p. 54.) This decision and judgment (Record, Vol. 1, pp. 55 and 61) was entered, to which there was an exception by counsel for Wong Wong. (Record, Vol. 1, p. 64.) No opportunity was allowed for any hearing or further evidence to be introduced if any such was necessary as to when the building was completed and accepted. The plaintiff sued out a writ of error to the Supreme Court. This judgment was affirmed by the decree of the Supreme Court to which this writ of error is directed. (Record, Vol. 2, p. 490.)

The decision of the Supreme Court in 25 Haw. 347, also says that the installment which was admittedly due December 4, 1914, need not be paid because Lew-

ers & Cooke, Limited, afterwards filed a mechanic's lien which that court decided could not be enforced, and which would have been released by such a payment to Lewers & Cooke, Limited, that being the intent of the assignment of payments to it by Wong Wong.

This case is one in which the owners of land have been seeking to avoid payment for $7,000.00 worth of improvements on their land by all technical means, including their motion to dismiss in this court an attempted repudiation of an admission of fact made by them in the argument before the Supreme Court that the figures 43 were the correct number in the contract. (25 Haw. 354.) This is a holding that, although the debt has been reduced to a judgment and the lien has been established by a decision of the Supreme Court, it cannot be enforced.

The plaintiff-in-error alleges error and says:

(1) That the court erred in affirming the judgment of the Circuit Court of the First Circuit of the Territory of Hawaii, dated April 12, 1920, which was rendered without trial of fact, modifying the judgment of September 4, 1918, of said Circuit Court, and ordering that the judgment against the defendant Honolulu Skating Rink, Limited, be released as a lien upon the land of the defendants Rosenbledt and Harrison;

(2) That the said court erred in ordering a non-suit for the defendants Rosenbledt and Harrison;

(3) That the said court erred in affirming the allowance of the motion for non-suit of said defendants

Rosenbledt and Harrison on the ground that nothing was due to the plaintiff by the defendant Honolulu Skating Rink, Limited, when the effect of the allowance of said motion and rendering said judgment was to leave the personal judgment against said Honolulu Skating Rink, Limited, undisturbed, save as to its being a lien on the land of said Morris Rosenbledt and Fred Harrison under Chapter 162 of the Revised Laws of Hawaii, 1915;

(4) Said court erred in holding that the Honolulu Skating Rink, Limited, owed the plaintiff nothing in said cause and at the same time holding that the plaintiff have judgment against the said Honolulu Skating Rink, Limited, in the sum of $3,998.60 with interest in the sum of $1,103.73 and costs in the sum of $186.35 in said cause;

(5) Said court erred in upholding the vacating and setting aside of that portion of the judgment entered by the Circuit Court of the First Judicial Circuit in said Territory in said cause on the 4th day of September, 1918, for the plaintiff and against the defendants Morris Rosenbledt and Fred Harrison, whereby the personal judgment was found by a decision of said Circuit Court for the plaintiff therein and for statutory attorneys' fees and costs of suit as taxed against the Honolulu Skating Rink, Limited, and was declared to be a lien under Chapter 162 of the Revised Laws of Hawaii, 1915, on the interest of the defendants Morris Rosenbledt and Fred Harrison in certain land described in plaintiff's complaint in said cause;

(6) That the Supreme Court erred in not affirming the judgment of the Circuit Court of September 4, 1918.

CHAPTER 162, REVISED LAWS, 1915, TERRITORY OF HAWAII: SECTIONS 2863, 2864 AND 2867.

"Sec. 2863. Allowed when. Any person or association of persons furnishing labor or material to be used in the construction or repair of any building, structure, railroad or other undertaking, shall have a lien for the price agreed to be paid for such labor or material (if it shall not exceed the value thereof) upon such building, structure, railroad or other undertaking, as well as upon the interest of the owner of such building, structure, railroad or other undertaking in the land upon which the same is situated.

"Sec. 2864. Filing notice; duration of lien. The lien provided in Section 2863 shall not attach unless a notice thereof shall be filed in writing in the office of the clerk of the circuit court, where the property is situated, and a copy of the notice be served upon the owner of the property. Such notice shall set forth the amount of the claim, the labor or material furnished, a description of the property sufficient to identify the same, and any other matter necessary to a clear understanding of the same. The lien shall continue for forty-five days, and no longer, after the completion of the construction or repair of the building, structure, railroad or other undertaking against which it shall have been filed, unless the same shall have been satisfied, or proceedings commenced to collect the amount due thereon by enforcing the same.

"Sec. 2867. Enforcement. The liens hereby provided may after demand and refusal of the amount due, or upon neglect to pay the same upon demand, be enforced by proceedings in any court of competent jurisdiction, by service of summons, as in other cases. Such summons shall set forth the ordinary

allegations in assumpsit, and, in addition thereto, note that a lien has been filed. Before proceeding to trial, the defendant shall be served with a detailed specification of the claim, provided that no such specification shall have been furnished before proceedings were commenced. Judgment upon such proceedings shall be as in ordinary cases, and may be enforced by execution as allowed by law. In case the contract for services or material upon which the lien has accrued shall have been directly with the owner of the property, an attachment may issue in connection with the suit upon the filing of a bond of indemnity to the said owner in such sum as the magistrate or court may fix. If it shall appear that such bond is insufficient, the magistrate or court shall cause a new bond to be filed for a greater amount, or with additional security."

ARGUMENT.

The main contention of the defendants is that the contract of the plaintiff with the Skating Rink was not completely finished on November 2, 1914. There is a finding by the trial court that the sum of the judgment "was then due and owing to him." (Record, Vol. 1, p. 16.) There is evidence of the plaintiff-in-error to this effect. (Record, Vol. 1, pp. 187, 206, 220, 258, Vol. 2, p. 337.)

The Supreme Court of the Territory holds that because the order for payment was dated November 4, 1914, a motion for non-suit should have been granted because there was no evidence that the building was accepted on November 2, 1914, by the architect, although his principal, the Skating Rink, admitted by its default, this allegation in the complaint, and although such an inference could have been drawn

from the direct evidence that the building was completed on that date to the satisfaction of the architect and was at some time accepted by him.

THE DEFAULT OF THE SKATING RINK WAS AN ADMISSION THAT THE BUILDING WAS ACCEPTED ON NOVEMBER 2, 1914, AS ALLEGED IN THE COMPLAINT, AND THAT THE DEBT WAS DUE.

Luce v. Chin Wa, 5 Haw. 629, "A judgment by default for want of appearance is, for this purpose, equivalent to a judgment by confession."
Tomishima v. Hurley, 25 Haw. 165.
Hunt v. San Francisco, 11 Cal. 259.
Schueler v. Mueller, 193 Ill. 402.
Smith v. Carley, 8 Ind. 451.
Hershy v. MacGreevy, 46 Ark. 498.
Bosch v. Kasing, 64 Iowa 312.
Bullard v. Sherwood, 85 N. Y. 256.
Utah Asso. of Credit Men v. Bowman, 38 Utah 326.

The Supreme Court further holds that the installment of $2,500.00 due on December 4, 1914, if there was no acceptance of the building till November 4th, was not due on December 16th when suit was brought because the contract provided that, if required, the plaintiff should furnish sufficient evidence that no liens had been filed and that the Skating Rink could protect itself against liens already filed by retaining

payment and Lewers & Cooke had filed a lien. This payment due December 4th had to be made to Lewers & Cooke and the lien was later declared to have been a nullity. *Lewers & Cooke v. Wong Wong,* supra. These defendants seek to claim a privilege which was personal to the Skating Rink and which the Skating Rink had waived by confessing judgment. The contention that the Skating Rink could retain payments to protect itself against a lien when the payment was to be made to the lienor and the same act would discharge the debt and discharge the lien if it had been valid, is somewhat novel.

Morrison Co. v. Henry Bigelow Williams, 200 Mass. 406.

THE SUPREME COURT DECIDED IN THE FORMER APPEAL THAT THE BUILDING WAS ACCEPTED AND COMPLETED ON NOVEMBER 2, 1914, AND THIS BECAME THE LAW OF THE CASE.

One of the grounds of the motion for non-suit which was granted in the lower court to the defendant in the first trial was that there was no evidence that the building was completed and accepted on November 2, 1914. (Record, Vol. 1, p. 144.)

The law in Hawaii is that if a valid ground is incorporated in a motion for non-suit, the granting of the motion must be affirmed if any of the grounds are well taken.

Lee Lun v. Henry, 22 Haw. 165.

Colburn v. Holt, 19 Haw. 65.

As the granting of the motion for non-suit was reversed and as the architect's certificate was before the court, there must have been a passing upon the question whether the debt was due or whether the action was prematurely brought, and the reversing of the granting of the motion for non-suit was a holding that the building was completed and accepted on November 2nd.

U. S. Trust Co. of New York v. Territory of New Mexico, 183 U. S. 534.

THE JUDGMENT AGAINST THE SKATING RINK NOT HAVING BEEN APPEALED BY ANY OF THE DEFENDANTS CONCLUDED THE QUESTION WHETHER THE DEBT WAS DUE AND ITS AMOUNT, AS A PERSONAL JUDGMENT AND DECLARING IT TO BE A LIEN ARE SEVERABLE AND DISTINCT.

State Bank v. Plummer, 54 Colo. 144, in which it was held a default judgment for personal liability estopped the owners of land who were joined in the action from disputing the same.

Germain v. Mason, 12 Wall., 20 L. Ed. 392, was a case of mechanic's lien in which it was held that the personal judgment was severable from the portion declaring it a lien and on a writ of error the other lienor need not be made parties, although this judgment was held to have had priority.

The latter case is cited with approval in *Hill v. Chicago N. E. R. Co.,* 140 U. S. 52, where when an appeal had been dismissed upon a decree which set-

tled all but one point in the issues, the court said on a second appeal on the final decree that the only questions being those arising under the former decree all the questions had been determined.

Mr. Justice Pitney of the United States Supreme Court when Chancellor of the State of New Jersey in a mechanic's lien case decided that where the personal judgment was finally determined in one judgment it could not be attacked in the action to enforce it as a lien. (*Ludy v. Larsen,* 78 N. J. E. 237.)

In *Schultz v. U. S. F. & G. Co.,* 201 N. Y. 230, a cemetery and its employe were sued in the same action for false arrest. The judgment was against each for $4,000.00, which was affirmed in the Appellate Division and on this appeal the U. S. F. & G. Co. went on the bond for the employe. The cemetery appealed to the court of appeals, but the employe did not, and there the judgment was reversed. The plaintiff brought suit on the employe's bond. The court said, "The inquiry will be whether the facts showed a judgment binding on the defendants jointly or severally, because based on a liability in its nature individual or distinct." "He (the employe) voluntarily withdrew from the litigation and while the defendant as surety, might have, very possibly, arranged for an appeal to be taken, through consent or subrogation not having done so it remained liable." "While it is true that its (the cemetery's) liability depended upon a case being made out against Smith, the latter's liability was independent."

That is this case. The liability of the Skating

Rink is independent, and when a judgment was entered against it and neither it nor any surety who could appeal by right of subrogation did appeal both the Skating Rink and its surety were concluded thereby. The only question left is as to whether the defendants were sureties for a judgment the amount of which cannot be disputed, nor the fact that it was due.

Default is an admission of all the facts in the complaint properly pleaded.

23 Cyc. 752.

Hybernia Savings & Loan Co. v. Churchill, 128 Cal. 633.

THE PERSONAL JUDGMENT AGAINST THE SKATING RINK AND THE JUDGMENT DECLARING IT A LIEN ARE SEVERABLE.

Rude v. Mitchel, 97 Mo. 76, 11 S. W. 225.

Copeland v. Dixie Lumber Co., 4 Ala. A. 230, 57 So. 124; 4 Corp. Juris. 1206, Sec. 3251.

Hooper v. Lincoln, 12 Haw. 352, "In such cases the judgment, in conformity with the allegations, is against the principal contractor on the contract and against the owner for the enforcement of the lien." This case in discussing the Hawaiian statute on mechanic's lien says that where a personal judgment cannot be entered against the owner of land, the enforcing of the judgment against the land is a mere matter of execution.

Allen & Robinson v. Redwood, 10 Haw. 151.

QUESTIONS ONCE DECIDED BECOME LAW OF THE CASE AND ON REVIEW OF A SECOND JUDGMENT THE ONLY QUESTION IS WHETHER FIRST OPINION WAS FOLLOWED.

Lederer v. Real Estate Title Ins. & Trust Co., 273 Fed. 933.

Where a non-suit was reversed and the evidence on second appeal was substantially the same, the questions passed upon in first appeal will not be again considered.

United States Trust Co. v. Territory of New Mexico, 184 U. S. 534.

U. S. v. Camou, 184 U. S. 572.

Roberts v. Cooper, 20 Haw. 481.

Minerals Separation v. Miama Copper Co., 269 Fed. 265.

The law of the case is thoroughly established. In *Lewers & Cooke, Limited, v. Wong Wong,* 23 Haw. 765; *Wong Wong v. Skating Rink,* 24 Haw. 181, and *Wong Wong v. Skating Rink,* 24 Haw. 347, the sufficiency of the contract to bind the land of the owners is decided. In *Wong Wong v. Skating Rink,* 24 Haw. 181, it is held that the demand was sufficient, the lien perfected and that the debt was due because the contract was completed and accepted on November 2, 1914. As no evidence was introduced of illegality, fraud, payment and release there was no question open for review by the defendant. The fact of the existence of the Lewers & Cooke lien was before the court. "THE COURT: Can these cases be tried to-

gether, gentlemen? MR. PETERS: Yes, your honor." (Record, Vol. 2, p. 307.) This agreement disposes of the exception to the admission of the record of the Lewers & Cooke case in the present case.

All of the defendants' other exceptions are to the admissibility of evidence which at the most would have entitled him to a new tried and not to a final judgment and allowance of a motion to dismiss.

THE SUPREME COURT HAS NO POWER TO ENTER JUDGMENT ON EXCEPTIONS.

Meheula v. Pioneer Mill Co., 17 Haw. 91.
Cotton v. Territory of Hawaii, 211 U. S. 162.
Hutchins v. Bierce, 211 U. S. 429.

The United States Supreme Court has laid down the rule that the sustaining or overruling of exceptions by the Supreme Court is not a final judgment from which an appeal can be taken, but the procedure is for further proceedings to take place in the trial court and then if the defeated party has not already exhausted his rights of review, on a writ of error, the Supreme Court again reviews the questions on the defeated party's appeal.

Bierce v. Waterhouse, 219 U. S. 320, 19 Haw. 594.

THERE WAS DIRECT EVIDENCE THAT THE CONTRACT WAS COMPLETELY FINISHED 43 DAYS BEFORE DEMAND WAS MADE FOR FINAL PAYMENT.

The contract provides, "It being understood that the final payment shall be made within forty-three

days after this contract is completely finished, provided, that in each of the said cases the architect shall certify in writing that all the work upon the performance of which payment is to become due has been done to his satisfaction." (Exhibit 1, marked Plaintiff's Exhibit "A.")

There was a default by the Skating Rink which was an admission.

(Record, Vol. 1, p. 187). MR. CASTLE: Q. Mr. Wong Wong, do you know when the building was completed? A. I finished work the 2nd day of November. * * * Q. What I want to find out is, was the work called for under the contract completed on November 2? COURT: I don't see any objection to the question, but he has answered it was completed on the 2nd. (Record, Vol. I, p. 206.) Mr. Withington testified, "I will say that the lien is sworn to—that the building was completed—the contract was completed on the 2d day of November, and I remember that demand was made on the third (forty-third) day after that." (Record, Vol. 1, p. 220) "Q. That was the time Mr. Withington gave you instructions to make this demand upon Ikeda, was it not?" WONG WONG: "A. It wasn't due until the 15th: I made the demand on the 15th."

(Record, Vol. 1, p. 179) "Q. And was this building completed to your satisfaction as an architect? A. It was." Testimony of Mr. Gill, the architect, authorized to accept the building.

(Record, Vol. 1, p. 229) Wong Wong testified: "A. Well, from the time the building was completed

and from the time of the contract and so on, and from that I got the conclusion that it was on the 15th I made demand."

(Record, Vol. 1, p. 216) Q. Mr. Wong Wong, you have already testified, have you not, that the building was completed on November 2? A. Yes, sir.

(Record, Vol. 1, p. 258) Mr. Peters: Q. And that building, according to the evidence, Mr. Walker, was finished on the 2d of November, 1914.

(Record, Vol. 2, p. 337) "Q. Can you state when the building was completed? A. On the 2d of November. Q. What year? A. 1914."

The decision of Edings was that sum was "then due and owing to" Wong Wong. (Vol. 1, p. 16, Record.)

THE ASSIGNMENT FOR SECURITY DOES NOT DEFEAT THE ENFORCEMENT OF THE LIEN.

Allen & Robinson v. Redwood, 10 Haw. 151.
Lewers & Cooke v. Wong Wong, 24 Haw. 39,
Lewers & Cooke v. Wong Wong, 22 Haw. 765,
Williams v. Weinbaum, 178 Mass. 238.
Davis v. Crookston Waterworks Co., 57 Minn. 402.
Dowd v. Dowd, 126 Mich. 649.
Palmer v. Mining Co., 70 Cal. 614;
Murphy v. Adams, 71 Me. 113.
McDonald v. Kelley, 14 R. I. 245.

THE ONLY REMAINING QUESTIONS IN THE SECOND TRIAL WITHOUT A CHANGE OF EVIDENCE WERE THOSE RAISED BY THE DEFENDANTS' PLEA OF PAYMENT, RELEASE, ILLEGALITY AND FRAUD.

The court in the first decision, 24 Haw. 181, decided that the evidence then submitted was enough to establish the lien. The answer of the defendants included an allegation of illegality, fraud, release and payment. (Record, Vol. 1, p. 45.) There was no evidence on any of these points.

The defendants to all intents pledged their land as security for the debt to the plaintiff-in-error. The proceedings are in the nature of garnishment process. It is as though action had been brought by Wong Wong against the Skating Rink and the defendants summoned as garnishees. If they were discharged by the lower court and on appeal the discharge was reversed, the garnishee cannot challenge the validity or amount of the principal debt from which there was no appeal.

Hensley v. Davidson Brothers Co., 135 Iowa 106, 14 Am. Cas. 62.

Ludy v. Larsen, supra.

Iselin v. Simons, 62 Minn. 128, 64 N. W. 143.

"The garnishee proceedings were ancillary to the main action, and a decision in the main action that the plaintiffs' claim is due and that they are entitled to judgment is, until set aside, conclusive on a motion to dismiss."

The case of *Ganahl Lumber Co. v. Weinsoeig,* 168 Cal. 664, 143 Pac. 1024, is a mechanic's lien case in which one of several lienors appealed from that portion of the judgment which disallowed their lien. Held that the portion allowing the liens of other lienors and paying the same was not reversed on a reversal of the judgment on Weinsoeig's appeal, as they were separable judgments and Weinsoeig was concluded by the other part. In this case the defendants never legally attacked the judgment of personal liability and it is now in force.

THE LEASE WAS SUFFICIENT TO BIND THE INTEREST OF THE OWNERS FOR A MECHANIC'S LIEN.

The decisions in *Lewers & Cooke, Limited, v. Wong Wong,* 22 Haw. 765, and in the former appeals in this case in 24 Haw. 181 and 25 Haw. 347, expressly hold as the law of the case that the lease was sufficient to make the defendants interested in the contract to the extent of rendering their interest in the land subject to the lien and the decisions in 24 Haw. 181 and 25 Haw. 347, and affirm that a demand upon the Skating Rink was sufficient to meet the requirements of the statute of a demand as they were jointly interested in the enterprise and a demand upon one was a demand upon all.

The case of *Arctic Lumber Co. v. Borden,* 211 Fed. 50, decided by this court is the authority upon which the decision in the Lewers & Cooke case rests, to wit: that an owner who contracts with his lessee to have

a structure erected on his land subjects his interest in the land to a mechanic's lien.

If they were parties to the enterprise sufficiently to render the land liable to a lien, the only demand necessary must be on the joint obligator who is primarily liable for the principal debt.

THE CIRCUIT COURT OF APPEALS HAS JURISDICTION.

The judgment of the Circuit Court of September, 1918, was for $3,998.60 and interest of $1,103.72. (Record, Vol. 1, pp. 18, 19.) This amounts to $5,102.32.

The case of *The Benson Mining & Smelting Company v. The Alta Mining & Smelting Company,* 145 U. S. 428, is decisive. There in the Territory of Arizona the plaintiff recovered a judgment in the lower court of $4,590.00 with interest at ten per cent. At the time this judgment was affirmed by the territorial Supreme Court the principal and interest amounted to more than $5,000.00. On the question of jurisdiction of the Supreme Court of the United States the parent to this statute, Chapter 355, 23 Stat, at L. 443, the court held it had jurisdiction.

Leckendorf v. Johnson, 123 U. S. 617.

N. Y. Elevated R. R. Co. v. Fifth National Bank, 118 U. S. 608.

The Patapseo v. Boyce, 12 Wall. 451.

All of these cases decide that the amount is to be determined as of the time of the judgment of the Su-

preme Court of the Territory and interest allowed in the judgment of the lower court or by statute is to be included.

The R. L., Territory of Hawaii, Sec. 3441, allows interest on judgments at the rate of six per cent.

The record in the Lewers & Cooke case was offered and limited to the question of law therein decided. (Record, Vol. 1, p. 244.) The evidence in the transcript can be applied only to the purpose for which it was offered. Wigmore on Evidence, Section 13; *State v. Farmer,* 84 Me. 440; 24 Atlantic 985.

All of the evidence as to the fact of incorporation of the Skating Rink was superfluous, as Mr. Peters, counsel for defendant, admitted the question of incorporation. (Record, Vol. 1, p. 101.)

In none of the defendants' exceptions which are incorporated in their bill of exceptions were they entitled to a final judgment, but at most to a new trial. (Record, Vol. 1, pp. 68-95.)

THE SECOND TRIAL WAS ONE WITH LIMITED ISSUES.

The order in *Wong Wong v. Skating Rink,* 24 Haw. 181, was, "The judgment of non-suit entered against the plaintiff as to the defendants, Rosenbledt and Harrison, is reversed and the cause is remanded to the circuit court for further proceedings consistent with the views herein expressed."

This court reversed the judgment of non-suit and remanded the cause for further proceedings.

Such an order is for a continuance of the trial, not a new trial or a rehearing.

Carey v. Hawaiian Lumber Co., 21 Haw. 506.

"With instructions to proceed in conformity with the opinion" precludes trying again questions decided. *Ex Parte French,* 91 U. S. 423.

Re Potts, 166 U. S. 263, quotes *Re Sanford Fork & Tool Co.,* 160 U. S. 247, "When a case has been once decided by this court on appeal, and remanded to the circuit court, whatever was before this court and disposed of by its decree is considered settled * * * But the circuit court may consider and decide any matter left open by the mandate of this court."

Wong Wong v. Skating Rink, 25 Haw. 92.

If the record on the second appeal shows additional evidence which is merely cumulative, the doctrine of the law of the case is applicable.

Westfall v. Wait, 165 Ind. 353, 73 N. E. 1089. 6 Ann Cases 788 note.

THERE WAS SUFFICIENT EVIDENCE FOR THE PRESIDING JUSTICE TO MAKE HIS FINDINGS THAT THERE WAS AN ACCEPTANCE BY THE ARCHITECT ON NOVEMBER 2, 1914.

There was a default of the Skating Rink which was an admission.

The contract does not provide that the acceptance of the building shall be in writing and there was a finding that the amount of the judgment "Was then due and owing to" the plaintiff-in-error. The certificate of the architect was not the acceptance, but an order for payment. The acceptance as of November 2, 1914, could be inferred from the evidence.

Wong Wong testified (Record, Vol. 1, p. 187) that the building was finished November 2, 1914.

The architect (Record, Vol. 1, p. 179) testified: "Q. And was this building completed to your satisfaction as an architect? A. It was."

An inference of fact can always be drawn that one does what he ought to do, and as the architect ought to have accepted the building when it was finished to his satisfaction, the presiding justice was entirely within his rights in drawing this inference from the testimony and finding that it was accepted on November 2, 1914.

Dix v. Atkins, 128 Mass. 43.

Ward v. Metropolitan Life Ins. Co., 66 Conn. 222. In this latter case the court held that the charge was erroneous in ruling that there is a presumption of law that in private matters one does his duty but that the evidence that an agent has knowledge was admissible as showing notice to the principal but that it is an inference of fact which the jury can draw therefrom that the agent would notify the principal, this being his duty. It goes on to show, however, the difference between admitting the evidence as evidence and charging that it was a presumption of law.

"The difference between a presumption of fact and one of law as these terms are commonly used, is that the former may be, and the latter must be, regarded by the trier."

It is the most natural inference that the architect accepted the building when he testified it was finished to his satisfaction as an architect. The Supreme Court in effect holds that the certificate for payment, which was not necessarily the acceptance

of the building, is conclusive as to the date of acceptance because it bore the date of November 4, 1914.

The holding of the Supreme Court inasmuch as by its decision it says it cannot pass upon the weight of evidence is that though completed on November 2, 1914, there was no right in the presiding justice to infer from the whole evidence that the architect accepted the building on November 2, 1914, even though he testified it was finished to his satisfaction as an architect.

The performance of a contract to the approval or satisfaction of the other party, relates to that party's mental condition, and if it is satisfactory he has not absolute right to reject the same. It is his duty to accept.

Inman Mfg. Co. v. American Cereal Co., 133 Ia. 71.

Lursley v. Johnston, 45 Ore. 30.

It therefore in this case is not whether the architect has rejected the building, but simply a question whether having testified that the building was completed to his satisfaction that a judge can draw an inference therefrom that he did his duty and accepted it.

"It is an affirmative fact, the presumption being, until the contrary appears, that every person will perform the duty enjoined by law or imposed by contract: Cooley on Torts, 659, 661." *Clements v. Louisiana Electric Light Co.,* 44 La. Ann. 692.

But this is all aside from the testimony of Wong Wong on p. 229, Vol. 1, of the record, wherein he

fixes his demand of December 15, 1914, as forty-three days after the completion of the contract which must include acceptance of the building or the court could infer the acceptance therefrom.

Santz Co. v. Glenn, 183 Fed. 666. Written statement of architect that work was satisfactory was evidence of acceptance of the work.

Andrew Lohr Bottling Co. v. Ferguson, 223 Ill. 88, decides that the certificate need not be given 10 days before payment where there is a clause for payment within 10 days after completion of the building, but the certificate may be given at any time before suit brought. It also decides that a denial of all liability on other grounds waives the necessity of a certificate.

A motion for non-suit admits not only all the evidence of the plaintiff, but any reasonable inference the jury might draw therefrom. The defendant's position is that a jury could not reasonably infer that a building which was admittedly completed on November 2, 1914, to the satisfaction of the architect, and was admittedly accepted by the architect, was accepted on November 2d, 1914, because he gave an order for payment which he was obliged to give in writing dated November 4, 1914.

Buttrick Lumber Co. v. Collins, 202 Mass. 413:

"It was open for the jury to say upon all the evidence, that all of the various details of defective workmanship set forth in the notice had been remedied wherever there had been departure from the specifications, and, from the conduct of the architect and the defendant in remaining silent when they

could have been found to have known it, * * * that as finally finished the building had been accepted as having been fully completed."

THE ANOMALOUS SITUATION IN THIS CASE IS DUE TO THE APPELLATE PROCEDURE IN HAWAII BEING DUAL—BY BILL OF EXCEPTIONS OR BY WRIT OF ERROR.

The situation in this case, there being extant a judgment against the Skating Rink for the amount of the plaintiff-in-error's claim and a reversal of the judgment for the lien against the defendant is due to the fact that the defendants took their appeal as allowed by the statutes of Hawaii by way of a bill of exceptions, which does not bring up the whole record but merely calls upon the reviewing court to pass upon specific questions raised by the bill. The statutes confer upon the Supreme Court no power to enter judgment upon exceptions.

Cotton v. Hawaii, 211 U. S. 160.
Meheula v. Pioneer Mill Co., 17 Haw. 91.

Both appeals by Wong Wong were by writ of error by which the Supreme Court had the record, the judgment and the parties before it and court pass upon all the questions in the case.

When the defendants took an appeal by way of exceptions, the Supreme Court was powerless to vacate the personal judgment against the Skating Rink and it now remains extant. The result is that a final judgment is impeached by a party to the record when it cannot be vacated with the absurd result that the

court decides in the same case that a judgment which is final was not due and owing.

The only logical holding is that a party to the record who does not appeal from a judgment which is severable is bound as to the conclusiveness of that part from which he does not appeal as much as he would be bound by a former judgment between the same parties.

Ludy v. Larsen, 78 N. J. E. 237.
Schultz v. U. S. F. & G. Co., 201 N. Y. 230.
Germain v. Mason, 12 Wall. 392.
Hill v. Chicago, supra.

SUMMARY.

It is contended by the plaintiff-in-error:

1st. That the default of the Skating Rink was an admission by the principal defendant of all the allegations in the complaint upon which the finding of the court was final, as the Supreme Court could not review questions involving weight of evidence.

2nd. That the amount of the final payment was shown to have been due by the decision of that question on the same facts in the former appeal and had so become the law of the case.

3d. Even if the Supreme Court was right in deciding that final payment was not due because forty-three days had not run, the claim for extras and the first and second installments were due and a lien for $2,580.00 should have been declared, as the defendants are not entitled to a credit of the $545.00 paid after the entire amount became due.

4th. The plaintiff was deprived of his right to introduce further evidence that the building was accepted on November 2, 1914, when the Circuit Court entered judgment on motion without any order therefor from the Supreme Court.

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